TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 231.

WESLEY HETRICK, PLAINTIFF IN ERROR,

vs.

VILLAGE OF LINDSEY, FRANK E. SEIGENTHALER, AUDITOR OF SANDUSKY COUNTY, AND HENRY F. SETZLER, TREASURER OF SANDUSKY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED FEBRUARY 26, 1923.

(29,425)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1923.

[fol. 1] IN THE

SUPREME COURT OF THE STATE OF OHIO

No. 17645

WESLEY HETRICK, Plaintiff in Error,

vs.

THE VILLAGE OF LINDSEY et al., Defendants in Error.

PETITION IN ERROR—Filed July 17, 1922

Wesley Hetrick, the plaintiff in error, says that at the May Term, A. D. 1922, of the Circuit Court of Appeals, in and for said Sandusky County, Ohio, to-wit on the second day of June, 1922, in certain proceedings on appeal then pending in said court wherein the parties were the same as herein, a judgment and decree of the Court of Common Pleas of said Sandusky County, was sustained in favor of the said defendant in error and against the said plaintiff in error, after making a slight decrease therein.

[fol. 2] And the plaintiff in error says that there is error prejudicial to him in said proceedings, record, judgment and findings of said Circuit Court of Appeals, in this, to-wit:

First. The said Court of Appeals erred in sustaining any finding, judgment or decree of said Court of Common Pleas against this plaintiff.

Second. In holding and decreeing that the proceedings and ordinances of the Village of Lindsey therein involved were legal.

Third. In not holding that the proceedings leading up to and resulting in the special assessment therein involved, were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In not holding that Sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834 and 3835, being the law under which the assessment herein involved was levied is unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States.

Fifth. That the judgment and decree of the Court of Common Pleas and the said Circuit Court of Appeals is contrary to law.

Sixth. Irregularities in the proceedings of the Village of Lind-
[fol. 3] sey, the Court of Common Pleas and the Circuit Court of Appeals by which the plaintiff in error was deprived of due process of law.

Seventh. Error of the Circuit Court of Appeals in overruling plaintiff's motion for a new trial.

Eighth. Other errors apparent upon inspection of the record.

Plaintiff in error therefore prays that said judgment may be reversed and that he may be restored to all things he has lost by reason thereof.

Albert H. Fry, Attorney for Plaintiff in Error.

(Precipe and waiver omitted.)

[fol. 4] COURT OF APPEALS OF SANDUSKY COUNTY, OHIO

No. 124

[Title omitted]

DOCKET AND JOURNAL ENTRIES

1922, Apr. 3.—Transcript of appearance docket and journal entry and all original papers from Common Pleas Court filed.

1922, May 9.—Tried and submitted. Judgment and decree abating assessment in part and confirming it in part, for reasons stated in opinion on file. Remanded for execution. Journal entry to be approved by counsel, each party to pay one-half costs. Journal 1, page 204.

1922, May 18.—Motion for a new trial filed.

1922, May 18.—Application for finding of facts filed.

1922, May 23.—Motion for a new trial filed.

1922, June 2.—Motion of plaintiff for new trial overruled. Motion of defendants for new trial overruled. Exceptions. Journal 1, Page —.

1922, July 5.—Bill of exceptions filed.

[fol. 5] 1922, July 6.—Bill of exceptions delivered to Judges of C. of A.

1922, July 10.—Bill of Exceptions returned to clerk.

1922, July 10.—Finding of facts filed.

Journal 1, page 204:

This cause was heard on the pleadings, the evidence and the arguments of counsel, and on consideration thereof the court finds that at and before the time of the commencement of the proceedings by the Council of the Village of Lindsey, Ohio, to improve Railroad Street in said village by paving, etc., as in its proceedings therefor specified, plaintiff was the owner of the adjoining lots number 175 and 176 in said village; that ever since the commencement of said proceedings for the said improvement of said street plaintiff has been and he is now the owner of said lots; that said lots each abut said improvement; that the actual value of said lots after the completion of said improvement was $2,600.00; that said lots were and are benefited by said improvement to the extent of one-third of said value of $2,600.00; that the claim of plaintiff that the assessment of $1,040.60 levied by the council of said village against said lots for the making of said improvement exceeds the amount that may be lawfully assessed therefor, is sustained; that so much of said assess-

ment as exceeds one-third of $2,600.00 is in excess of the lawful amount that may be levied for said improvement; that the claim of plaintiff that the assessment statutes of Ohio under which said improvement was made are unconstitutional, is not sustained.

[fol. 6] It is therefore ordered that the assessment against said lots for said improvement in the amount of $866.67 be and the same is sustained, and all of said assessment in excess of $866.67 is ordered abated, and the defendants are perpetually enjoined from collecting for the making of said improvement, as the assessment against said lots, any sum in excess of $866.67.

It is ordered that the costs of this case shall be paid, one-half by the plaintiff and one-half by the Village of Lindsey, Ohio, and judgment is rendered against each of said parties for the costs herein ordered to be paid by them.

To each and all of said findings and orders the plaintiff excepts.

To the finding that said real estate was, after the completion of said improvement of the actual value of only $2,600.00 and that the assessment for said improvement should not exceed one-third of said amount of $2,600.00, to said order abating and enjoining the collection of all of said assessment against said lots in excess of $866.67, and ordering the Village of Lindsey, Ohio, to pay one-half of the costs of this case, the Village of Lindsey, Ohio, excepts.

Journal 1, page —:

This cause came on to be heard upon the motion of the plaintiff for a new trial and a finding of facts, and the court being advised in the premises, the court separately states its conclusion of fact filed herewith, and the court being further advised, the motion for a new trial on the part of the plaintiff is hereby overruled, and plaintiff is allowed exception to this ruling of the court.

[fol. 7] And this cause came on further to be heard upon motion of the defendants for a new trial and upon a request upon the part of the defendants that the court state separately its conclusion of facts, and the court being fully advised in the premises, does separately state its conclusion of facts, which are filed herewith together with exception of defendants to certain findings noted therein, which are allowed, and the court being further advised, it is ordered that defendants' motion for a new trial be, and the same is hereby overruled, and an exception to this ruling is allowed to the defendant.

(Duly certified.)

[fol. 8] Circuit Court of Appeals

FINDING OF FACTS—Filed July 10, 1922

And within ten days after the rendition of the decree in this case the plaintiff by his counsel requested the court to separately state its conclusions of facts and of law herein, and thereupon the defendant by its counsel also requested the court to separately state its conclusions of facts and law herein, and the court finds the facts as follows:

1. There never was a date or place set at any time where evidence or proof might be introduced with reference to that ordinance or that improvement, and plaintiff never requested any such date or place to be fixed.

2. The assessment for the improvement involved herein was levied and assessed by the foot front of the property bounding and abutting upon the improvement.

3. No petition was signed for the improvement in question.

4. Notice of the passage of the resolution of necessity for the improvement was served by the clerk in writing on the plaintiff personally on May 10th, 192 ; which with reference to the other proceedings was at a proper time.

5. On March 11th, 1921, a notice was mailed to the plaintiff to the effect that on March 11th, 1921, the council of the Village of Lindsey had passed an ordinance, by which the sum of $1,040.60 had been levied against the property of the plaintiff, which notice was in due course received by the plaintiff.

[fol. 9] 6. That no tice was personally served on the plaintiff at any time other than those mentioned herein.

7. Council of the Village of Lindsey, Ohio, found and determined that it was necessary to improve Railroad Street between the designated points by grading, draining, curbing and paving with brick upon a concrete or crushed stone foundation. The improvement was accordingly made upon a concrete foundation.

8. That the resolution declaring the necessity of the improvement contained all matter and things required by the statutes.

9. That at the time of the passage of said resolution, plans, profiles, estimates and specifications of said improvement were on file as required by law and the improvement made in accordance therewith.

10. An improvement of said street between the points designated by the council was necessary and the council so found.

11. Plaintiff's lots Nos. 175 and 176 in the Village of Lindsey, Ohio, were platted lots and were platted lots at and before the time the proceedings to improve said street were commenced.

12. Plaintiff's lots Nos. 175 and 176 adjoin and each abuts said improvement, a saw mill property is located upon both said lots and a saw mill business transacted thereon.

13. All resolutions and ordinances required by the statute were passed by the council and publications and service of the same was made and all notices were given and all things required by the statutes to be done were properly done by the council and officers of [fol. 10] said village and all proceedings relative to said improvements were regular and in accordance with the statutes, if the mailing of notice of the assessment to plaintiff was in accordance with the statutes, and this court finds that such mailing was in accordance with the statute.

14. The council provided that 3/50th of all the costs and expense of said improvement, also the costs of intersections, should be paid by the village. The village also paid for the cost of the construction of a bridge across the county ditch which crosses said improved

street near plaintiff's lots, no part of which cost was especially assessed against plaintiff's lots.

The remainder of the cost of said improvement was assessed by the foot front upon the property bounding and abutting upon the improvement.

15. The council found and determined by ordinance that the several lots bounding and abutting upon the improvement were each severally especially benefited by the improvement to the extent of their proportionate cost thereof and levied against them each respectively for said improvement.

16. No claims for damages were ever filed.

17. Plaintiff never requested any hearing by or before the council in the matter of said improvements or any of the proceedings relative thereto. Such a hearing was never requested by any one else.

18. Plaintiff resided in Lindsey all the time of the action of the legislation for said improvement and was all the time personally in and about the improvement and during all the time the improvement was being made plaintiff resided in Lindsey and was in and [fol. 11] about Lindsey and knew of and saw the progress of the work at all times and made no objections thereto.

19. Said street improvement was completed about December 1st, 1920.

20. After the work had commenced plaintiff with his counsel appeared before the Village Council and requested that the improvement in front of his said lots be changed so as to eliminate the curbing above the brick on the side next his lots and cause the drainage of the pavement to be in the middle of the street, and this request was granted by the council and the improvement made accordingly.

21. That the actual value of said lots 175 and 176, after the completion of said improvement was $2,600.00.

22. That said lots were and are benefited by said improvement to the extent of one-third of said value of $2,600.00.

23. All meetings of the council were open and held at its usual meeting place.

24. There is no indication of collusion, fraud or bad faith on the part of the council or any of its members.

To finding No. 21, that the actual value of said lots, after the completion of said improvement, was only $2,600.00, the defendant excepts.

And to finding No. 22, that said lots were benefited only to the extent of one-third of $2,600.00, the defendant excepts.

O. K. W. J. Mead, Attorney for the Village of Lindsey, Ohio. O. K. Albert H. Fry, Attorney for Plaintiff.

[fol. 12] IN THE COURT OF COMMON PLEAS OF SANDUSKY COUNTY, OHIO.

[Title omitted]

PETITION—Filed June 8, 1921

The plaintiff avers that the defendant, the Village of Lindsey, is a corporation duly organized under the laws of the State of Ohio, and is situated in Sandusky County; the defendant, Frank E. Seigenthaler is the duly elected, qualified and acting County Auditor of said Sandusky County; the defendant, Henry F. Setzler, is the duly elected, qualified and acting County Treasurer of said Sandusky County.

That the plaintiff is the owner of lots Nos. 175 and 176, bounding and abutting on Railroad Street, between Block Street and Elm Street in said Village of Lindsey.

On the third day of May, A. D. 1920, the village council of the defendant, the Village of Lindsey, adopted a resolution declaring [fol. 13] it necessary to improve the roadway of Railroad Street, from Main Street to Block Street by grading and constructing thereon a brick pavement in accordance with the plans and specifications therefor on file in the office of the village clerk.

The said resoluion further provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said Railroad Street between the points named, by the foot front. On June 7, A. D. 1920, the village council of said defendant, the Village of Lindsey, passed an ordinance to proceed with the said improvement of said street between the points above named in the manner provided for in said resolution.

Afterwards the said village entered into a written contract with A. G. Witte & Son, as contractor for doing said work. Said A. G. Witte & Son did work under said contract on said street which was afterwards accepted by the said defendant, the Village of Lindsey.

That afterwards, on the 11th day of March, A. D. 1921, the said village passed an ordinance levying the sum of $6.05 upon each front foot of property bounding and abutting on said improvement, and thereby levied the sum of $199.65 on lot No. 175 and the further sum of $840.95 on lot No. 176, belonging to the plaintiff, and ordered that said assessment be certified by the Village Clerk to the County Auditor to be placed upon the tax duplicate of the county for collection, which was accordingly done.

The said ordinance levying said assessment upon plaintiff's said [fol. 14] lots and the proceedings of said village providing for the improvement herein mentioned are irregular, illegal and void, and of no effect for the purpose of charging said assessment or any part thereof upon the said lots of plaintiff, for the following reasons:

1. The said improvement was made under and by virtue of Chapter 5, Section 3815 et seq., G. C. of the State of Ohio. The said law is unconstitutional and void for the reason that it does not provide for notice to be given to the owner of the property and an

opportunity to be heard before the tax is levied and is therefore repugnant to and in conflict with Article I, Section 16, and Article I, Section 19 of the Constitution of the State of Ohio, and therefore and for the same reason it is in conflict with and repugnant to Article 14, Section I of the Constitution of the United States.

2. That the defendant, the Village of Lindsey, did not serve notice in writing upon the plaintiff of the resolution declaring it to be necessary to improve the said Railroad Street and did not give the plaintiff an opportunity to be heard upon the question of the necessity of the said improvement of said street.

3. That the defendant, the Village of Lindsey, did not serve notice upon the plaintiff and did not give the plaintiff an opportunity to be heard prior to the adoption of the resolution to proceed.

4. That the defendant, the Village of Lindsey, did not serve notice on the plaintiff, nor did they give the plaintiff an opportunity to be heard before the passage of the ordinance making said levy, [fol. 15] notwithstanding that this defendant was, at the time of the adoption of all of the said resolutions and ordinances, and continuously since has been, a resident of the Village of Lindsey, and of Sandusky County, all of which is repugnant to and in conflict with Article 14, Section I, of the Constitution of the United States, in this, that it does not constitute due process of law as required by said Article 14.

5. The said Village of Lindsey let said contract to A. G. Witte & Son without advertising for bids for the said improvement, and without competitive bidding, contrary to the statute in such case made and provided for.

6. That the various proceedings herein enumerated, nor any of them, nor either of them, were advertised or published in the manner required by law.

7. That all of said proceedings and doings herein enumerated were done without the authority or consent of the plaintiff.

But if it shall be found by the court that the foregoing objections to said assessments are not true and the said assessment is not hereby rendered void, then the plaintiff avers that there should be a substantial reduction in said assessment, for the following reasons:

1. The said assessment is very greatly in excess of the benefits to the lots of this plaintiff, or either of said lots.

2. The said assessment is greatly in excess of the limit allowed by law to be levied upon property for local improvement.

Wherefore, the plaintiff prays that upon the filing of this petition a temporary restraining order may issue restraining the County Trea- [fol. 16] surer from collecting or attempting to collect said assessment or any portion thereof levied upon the plaintiff's said lots, that upon the final hearing of this cause said assessment may be adjudged null and void, and that the defendants and each of them may be enjoined from collecting or attempting to collect the same and for all other and proper relief.

Albert H. Fry, Attorney for Plaintiff.

(Verification and præcipe omitted.)

[fol. 17] COMMON PLEAS COURT

SEPARATE ANSWER OF THE VILLAGE OF LINDSEY—Filed Sept. 19, 1921

This answering defendant admits that it is a corporation duly organized under the laws of the State of Ohio, and is situated in Sandusky County, Ohio; that the defendant Frank E. Siegenthaler is the duly elected, qualified and acting County Auditor of said Sandusky County; that the defendant Henry F. Setzler was at the time of the filing of the petition herein, the duly elected, qualified and acting County Treasurer of said Sandusky County; that the plaintiff is the owner of lots numbers 175 and 176, bounding and abutting on Railroad Street between Block Street and Elm Street in said Village of Lindsey; that on the 3rd day of May, 1920, the village council of said Village of Lindsey, adopted a resolution declaring it necessary to improve said Railroad Street from Main Street to Block Street by grading and constructing thereon a brick pavement, etc., in accordance with the plans and specifications therefor on file in the office of the village clerk; that said resolution provided that the cost and expense of said improvement should be levied and assessed upon the property bounding and abutting upon said Railroad Street between the points named, by the foot front, except that this defendant avers that said resolution provided that three-fiftieths of the whole cost of the said improvement and the cost of intersections should be paid by said village.

[fol. 18] This answering defendant further admits that on June 7th, 1920, the village council of said Village of Lindsey passed an ordinance to proceed with said improvement of said street between the points named and in the manner provided for in said resolution; that afterwards said village entered into a written contract with A. G. Witte and Son as contractor for doing said work; that said A. G. Witte and Son did work under said contract on said street which was afterwards accepted by said village, and this defendant avers that said contractor did all the work in the improvement of said street, that said work of said street improvement was completed and accepted by said village and said contractor was fully paid before plaintiff filed his petition herein.

This answering defendant admits that on the 11th day of March, 1921, the council of said village passed an ordinance levying the sum of $6.05 upon each foot front of the property bounding and abutting on said improvement and thereby levied the sum of $199.65 on said lot number 175, and the further sum of $840.95 on said lot number 176 belonging to the plaintiff, and ordered that said assessment be certified to the County Auditor of Sandusky County, Ohio, as specified in said ordinance, and that the first installment of said assessment has been certified by the clerk of said village to said county auditor, but it avers that it was provided in said ordinance that said assessment was payable in cash within thirty days from said levy upon due notice being given, and that if not so paid in cash

the installments of said assessments should be certified by the clerk [fol. 19] of said village to said county auditor on or before the second Monday in September annually to be by said county auditor placed upon the tax duplicate and collected as other taxes are collected.

This answering defendant admits that said improvement was made under and by virtue of Chapter 5, Div. 111, Tit. XII, Section 3812 et seq., of the General Code of Ohio; that plaintiff was at the time of the adoption of all of the resolutions and ordinances relative to said street improvement and continuously since has been a resident of said Village of Lindsey, Ohio, and this answering defendant avers that plaintiff solicited and encouraged the making of said improvement, that he had full knowledge of all proceedings relative thereto prior to and at the time such proceedings were taken, that he had full knowledge of the character and progress of the work of said improvement as same proceeded, that he consulted with the council of said village as to the manner of the construction of said improvement and was by said council given full hearing, that he encouraged and was largely instrumental in procuring said improvement construction to be made in the manner in which it was made, that he at all times both before the commencement of said work and during its entire progress knew that he was to be charged with the proper proportionate cost thereof and that he made no objection to said improvement or the proposed assessment therefor prior to the filing of his [fol. 20] petition herein, and this defendant denies each and every averment in plaintiff's petition which is not hereinbefore specifically admitted.

The Village of Lindsey, Ohio, By W. J. Mead, Its Attorney.

(Duly verified.)

Common Pleas Court

Docket and Journal Entries

1921, June 8.—Petition and precipe filed.

1921, June 8.—Summons issued to Sheriff of Sandusky Co.

1921, June 20.—Summons returned and filed, endorsed as follows: Received this writ June 9, 1921, at 3 o'clock P. M. and pursuant to its command I summoned the within named Village of Lindsey by C. L. Blaker, Mayor of said Village, Frank E. Seigenthaler, Henry F. Setzler, Treasurer of said county by handing to each of them personally on June 18, 1921, a true and certified copy of this writ with all the endorsements thereon. O. C. Ballard, Sheriff.

1921, Aug. 8.—Defendant is given thirty days to plead. Journal 53, page 195.

1921, Sept. 15.—Leave granted to defendants to plead in 10 days. Journal 53, page 248.

1921, Sept. 19.—Answer of the Village of Lindsey filed.

[fol. 21] 1921, Oct. 10.—Cause continued.

1922, Jan. 2.—Cause continued.

1922, Jan. 26.—Petition dismissed at plaintiff's costs. Appeal bond fixed at $200.00. Journal 53, page 453.
1922, Feb. 28.—Appeal bond filed.

Common Pleas Journal, 105th day, Aug. 8, 1921, April Term, Journal 53, page 195:

Defendant is given thirty days to plead.

Common Pleas Journal, 134th day, Sept. 15, 1921, April Term, Journal 53, page 248:

Leave granted defendants to plead within ten days.

Common Pleas Journal, 22nd day, Jan. 26, 1922, Jan. Term, Journal 53, page 453:

This cause was heard on the pleadings, the evidence and the arguments of counsel, and on consideration thereof the court finds that the claim of the plaintiff that the assessment levied by the council of the Village of Lindsey, Ohio, for the improvement of Railroad Street in said village, upon the property of the plaintiff described in his petition, to-wit, lots number one hundred and seventy-five and one hundred and seventy-six, in said village, is in excess of the amount that may be lawfully assessed therefor, is not sustained.
The court also finds that the other claims of plaintiff against the validity of said assessment are not sustained.
The court therefore finds against the plaintiff and in favor of said defendant the Village of Lindsey, Ohio.
It is therefore adjudged and decreed on this the 26th day of [fol. 22] January, 1922, that the plaintiff's petition be and the same is dismissed at plaintiff's costs taxed in the sum of $— for which amount judgment is hereby rendered against plaintiff, and plaintiff giving notice of his intention to appeal this cause to the Court of Appeals of Sandusky County, Ohio, the appeal bond therefor is fixed in the sum of $00.00.
(Duly certified.)

[fol. 23] In the Supreme Court of the State of Ohio

No. 17645

[Title omitted]

Motion to Dismiss

(Filed in Supreme Court Oct. 23, 1923)

Defendant in error moves the court to dismiss the petition in error of the plaintiff in error herein for the following reasons:
1. The petition in error herein was filed by the plaintiff in error without leave of this court first granted, he claiming that the case

involves a question under the constitution of the United States, in that the statutes of the state of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment of the Constitution of the United States, when in fact these statutes have so long been held constitutional by the courts of this state and have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned, and the petition in error herein should not be filed as a matter of right and it is now on file without authority or right.

W. J. Mead, Attorney for Defendant in Error.

October 16, 1922.

On this date received a copy of the above motion.

Albert H. Fry, Attorney for Plaintiff in Error.

[fol. 24] STATE OF OHIO,
City of Columbus:

SUPREME COURT OF THE STATE OF OHIO, OF THE TERM OF JANUARY, A. D. 1922, TO WIT, TUESDAY, DECEMBER 5TH

[Title omitted]

ORDER DISMISSING CASE

Motion by Defendant to Dismiss Petition in Error in Cause No. 17645 on the General Docket

It is ordered by the court that this motion be, and the same hereby is, sustained, and that the petition in error herein be, and the same hereby is, dismissed.

It is further ordered that the defendant in error recover *recover* from the plaintiff in error its costs herein expended, taxed at $—.

Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said Court, to-wit: from Journal No. 29 Page 296.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 21st day of December A. D. 1922.

Seba H. Miller, Clerk. (Seal of the Supreme Court of the State of Ohio.)

[fol. 25] STATE OF OHIO,
City of Columbus, ss:

SUPREME COURT OF THE STATE OF OHIO, OF THE TERM OF JANUARY, A. D. 1922

CLERK'S CERTIFICATE

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the *the* foregoing is a true and correct copy of the transcript of record filed in Cause No. 17645—Wesley Hetrick v. The Village of Lindsey, et al., in the Supreme Court of the State of Ohio under date of August 7, 1922; and that attached to said transcript of record is a true and correct copy of motion by defendant to dismiss the petition in error, and the journal entry thereon, in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 21st day of December, A. D. 1922.

Seba H. Miller, Clerk Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 26] UNITED STATES OF AMERICA:

SUPREME COURT OF THE STATE OF OHIO

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United Sates a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 17th day of February, A. D. 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 27] IN THE SUPREME COURT OF THE STATE OF OHIO

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Feb. 7, 1922

To the Honorable Carrington Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Now comes Wesley Hetrick, of Sandusky County, Ohio, and alleges that this plaintiff in error brought this action against the Vil-

lage of Lindsey, Frank E. Seigenthaler, County Auditor, and Henry F. Setzler, County Treasurer, and that upon the trial of this cause the Court of Common Pleas of Sandusky County, Ohio, dismissed the petition of plaintiff in error for an injunction restraining the collection of certain special assessments.

Plaintiff in error further alleges that on the fifth day of December, A. D. 1922, final judgment was rendered against your petition by the Supreme Court of the State of Ohio, that being the highest court of law or equity in the said state of Ohio, wherein it was adjudged that the Court of Common Pleas of Sandusky County, Ohio, did not err in dismissing the petition for injunction; that the Court of Appeals of Sandusky County, Ohio, did not err in sustaining the finding or decree of said Court of Common Pleas against this plaintiff; that the said Court of Appeals did not err in not holding that the proceedings leading up to and resulting in the special assessment therein involved were unconstitutional, illegal and void and in violation of th fourteenth Amendment of the Constitution of the United States; that the said Court of Appeals did not err in not holding that sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834, and 3835 being the law under which the assessment herein involved was levied is unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States, and wherein it was by said Supreme Court of the State of Ohio further adjudged that the said assessment is a valid law and not in violation of and repugnant to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

[fol. 28] All of which appears in the record and final judgment of the said Supreme Court of the State of Ohio affirming the judgments of the Court of Appeals and Court of Common Pleas of Sandusky County, Ohio.

Wherefore, your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in said case may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected, and said judgment reversed, and said cause remanded for further proceedings, and your petitioner will ever pray.

Wesley Hetrick, By Albert H. Fry, His Attorney.

The Writ of Error as prayed for in the foregoing petition is hereby allowed this sixth day of February, 1923, and the bond for costs is fixed at the sum of two hundred fifty dollars ($250.00).

Dated at the City of Columbus, Ohio, this sixth day of February, 1923.

C. T. Marshall, Chief Justice, Supreme Court of the State of Ohio.

[File endorsement omitted.]

[fol. 29] SUPREME COURT OF THE UNITED STATES, —— TERM, 1922

No. 17645

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 17, 1922

Wesley Hetrick, the plaintiff in error, says that at the January term, A. D. 1922, of the Supreme Court of Ohio, to-wit, on the 5th day of December, A. D. 1922, in certain proceedings in error, then pending in said court, wherein the parties were the same as herein, a judgment and decree was entered, sustaining a judgment and decree of the Court of Common Pleas of Sandusky County, Ohio, and the Circuit Court of Appeals of Sandusky County, Ohio, in favor of the defendant in error and against the plaintiff in error.

And the plaintiff in error says that there is error prejudicial to the plaintiff in error in said proceedings, record, decree, and findings of the said Supreme Court in this, to-wit:

First. The Supreme Court erred in sustaining any finding, judgment or decree of the Court of Common Pleas of Sandusky County or of the Circuit Court of Appeals of Sandusky County, Ohio, against this plaintiff.

Second. The said Supreme Court erred in holding and decreeing that the proceedings and ordinances of the Village of Lindsey involved in said cause were legal and constitutional.

Third. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the [fol. 30] United States, in this that they did not constitute due process of law as required by said amendment.

Fourth. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal, and void and in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that proper notice was not given to the plaintiff in error and no hearing or opportunity to be heard was granted to said plaintiff in error before the assessment in question became a finality and constituted a lien on his property, as required by said Fourteenth Amendment.

Fifth. The said Supreme Court erred in not holding that sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834, and 3835, being the law under which the assessment herein involved was levied, are unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amndment of the Constitution of the United States.

Sixth. The said Supreme Court erred in not holding that the sections of the code enumerated in the fifth assignment of error are un-

constitutional and illegal by reason of the fact that it does not provide for a proper notice and does not provide for a hearing or an opporunity to be heard with reference to an assessment before it becomes a finality as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Seventh. The said Supreme Court erred in not finding that the judgment and decree of the Court of Common Pleas and of the said Circuit Court of Appeals is contrary to law.

Eighth. The said Supreme Court erred in not finding and holding that there were irregularities in the proceedings of the Village of [fol. 31] Lindsey in connection with said assessment by which and in consequence of which the plaintiff in error was deprived of property without due process of law.

Ninth. That the said Supreme Court erred in not reversing the judgment and decree of the Court of Common Pleas of Sandusky County and the judgment and decree of the Circuit Court of Appeals of Sandusky County on the ground that the assessment deprived the plaintiff in error of property without due process of law and was, therefore, illegal and void and in violation of the requirements of the Fourteenth Amendment of the Constitution of the United States.

Tenth. For other errors apparent upon the inspection of the record, committed by the said Supreme Court in said cause.

That said judgment and decree may be reversed and that he may be restored to all things that he has lost by reason thereof.

Albert H. Fry, Attorney for Plaintiff in Error.

[File endorsement omitted.]

[fol. 32] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

ORDER ALLOWING WRIT OF ETTOR—Filed Feb. 7, 1922

The above entitled cause coming on to be heard upon the petition of plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Cout of the State of Ohio, and upon examination of said petition and the record in said cause and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record of said cause:

It is ordered that a writ of error be, and the same is hereby allowed from this Court to the Supreme Court of the United States upon the presentation and approval of a bond by the petitioner.

Columbus, Ohio, February 6, 1923.

C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[File endorsement omitted.]

[fol. 33] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

WRIT OF ERROR—Filed Feb. 7, 1922

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said State in which decision could be had in said suit between Wesley Hetrick and the Village of Lindsey et al., wherein was drawn in question the validity of the statute of said State and the validity of certain proceedings of the said Village of Lindsey on the ground of being repugnant to the provisions of the Constitution of the United States, and the amendments thereto and said decision was in favor of such, its validity, *in* manifest error hath happened, to the great damage of the said Wesley Hetrick as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the — day of March, 1923, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

[fol. 34] Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States the seventh day of February in the year of our Lord, 1923.

B. E. Dilley, Clerk U. S. District Court, S. D. of Ohio, By C. P. White, Jr., Deputy. (Seal of United States District Court, Southern D. of Ohio.)

Allowed by

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

[File endorsement omitted.]

[fol. 35] IN THE SUPREME COURT OF THE STATE OF OHIO

No. 17645

[Title omitted]

CITATION AND SERVICE—Filed Feb. 17, 1922

UNITED STATES OF AMERICA, *ss:*

To the Village of Lindsey, Frank E. Seigenthaler, Auditor Sandusky County, and Henry F. Setzler, Treasurer Sandusky County, Ohio, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days of the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Ohio, wherein Wesley Hetrick is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered herein against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that half.

Dated 6th day of February, 1923.

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

It is hereby ordered that William Writ, sheriff of Sandusky County, Ohio, be deputized to serve the foregoing citation and that his return of service be made by affidavit, the same to be attached to and filed with the Citation in this cause.

C. T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 36] STATE OF OHIO,
County of Sandusky, ss:

William Wirt, of lawful age, being first duly sworn, says: My name is William Wirt, I am the duly qualified sheriff of Sandusky County, Ohio and I was duly authorized and deputized by Honorable C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio, to serve upon the defendants in error the citation hereto attached. I served the same by handing personally to, Calvin Bloker, Mayor of the Village of Lindsey, Frank E. Seigenthaler, Auditor of Sandusky County, Ohio and Frank L. Yerges Treasurer of Sandusky County, Ohio, successor to Henry Setzler named in said writ, each, a true and certified copy of said citation with all indorsements thereon at Sandusky County, Ohio, February 17, 1923.

William T. Wirt.

Sworn to before me and subscribed in my presence this 17th day of February, 1923.

E. C. Sturm, Notary Public, Sandusky County, Ohio.
[Notarial Seal, Sandusky County, Ohio.]

Mileage, $1.28; Service $1.25
1.28

2.53

[File endorsement omitted.]

[fols. 37 & 38] In the Supreme Court of the State of Ohio

No. 17645

Bond for $250.00 for Costs Approved, Marshall, C. J.—[Omitted in Printing]

[fol. 39] Supreme Court of the State of Ohio, January Term, A. D. 1923

Docket and Minute Entries

(Minute Book No. 37, Page 45)

No. 17645

Title of Case

Wesley Hetrick, Plaintiff in Error,

v.

The Village of Lindsey et al.

Action: Error to the Court of Appeals of Sandusky County.
Attorneys: Albert H. Fry, Fremont, Ohio, for plaintiff in error; W. J. Mead, Fremont, Ohio, for defendant in error.

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders, and Decrees

1922.

July 17th. Petition in error (as of right) precipe and waiver of summons filed.

" " Court of appeals transcript, original papers and bill of exceptions filed.

" " Papers sent to The H. J. Chittenden Company, Toledo, Ohio by express. Aug. 7, 1923, returned.

" 31st. Plaintiff's printed briefs filed. Proof of service by affidavit filed. Aug. 3, 1922, proof of service, receipt filed.

Aug. 7th. Printed record and affidavit of service filed.
" 11th. Proof of service card filed.
" 28th. Plaintiff's printed briefs returned to The H. J. Chittenden Co.
Sept. 1st. Printer's receipted bill filed.
" 7th. Plaintiff's printed briefs returned by The H. J. Chittenden Co.
Oct. 11th. Defendant's printed briefs and proof of service filed.
" 23rd. Motion by defendant to advance and consent filed, overruled. Journal No. 29, page 277.
" 23rd. Motion by defendant to dismiss and proof of service filed, sustained. Journal No. 29, page 296.
Dec. 12th. Certified copy of entry sent to Clerk.
" 12th. Original papers and bill of exceptions sent to Clerk.

1923.
Feb. 7th. Petition for writ of error, order allowing writ and assignment of errors filed.
" " Citation issued for defendants to Sheriff of Sandusky County, returnable forthwith.
" " Writ of error filed.

[fol. 40] *Transcript of Journal Entries*

1922.
Nov. 7th. Motion by defendant to advance case No. 17645, on the General Docket.

"It is ordered by the court that this motion be, and the same hereby is, overruled."
Journal No. 29, page 277.

Dec. 5th. Motion by defendant to dismiss petition in error in cause No. 17645, on the General Docket.

"It is ordered by the court that this motion be, and the same hereby is, sustained, and that the petition in error herein be, and the same hereby is, dismissed.
"It is further ordered that the defendant in error recover from the plaintiff in error its costs herein, expended, taxed at $—."
Journal No. 29, page 296.

[fol. 41] IN SUPREME COURT OF OHIO

CERTIFICATE OF LODGMENT

SUPREME COURT

STATE OF OHIO, *ss:*

I, Seba H. Miller, Clerk of the said Court, do hereby certify that there was lodged with me as said Clerk on February 14th, 1923, in the matter of Wesley Hetrick, plaintiff in error, versus The Village of Lindsey et al., defendants in error:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Columbus, Ohio, this 17th day of February, 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

[fol. 42] IN THE SUPREME COURT OF OHIO

No. 17645

WESLEY HETRICK, Plaintiff in Error,

v.

THE VILLAGE OF LINDSEY et al., Defendants in Error.

CLERK'S CERTIFICATE

STATE OF OHIO,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for a writ of error, assignment of errors, order allowing writ, writ of error, citation and return of service thereof, are the original papers filed in this court in the above entitled cause; that the copy of the bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Supreme Court and used in the consideration of said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court, and that no opinion was rendered by the court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 17th day of February, A. D. 1923.

Seba H. Miller, Clerk Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

Endorsed on cover: File No. 29,425. Ohio Supreme Court. Term No. 231. Wesley Hetrick, plaintiff in error, vs. Village of Lindsey, Frank E. Seigenthaler, auditor of Sandusky County, and Henry F. Setzler, treasurer of Sandusky County. Filed February 26th, 1923. File No. 29,425.

IN THE

Supreme Court of the United States

No. 29425

October Term, 1923.
No. 231.

WESLEY HETRICK,

Plaintiff in Error.

vs.

VILLAGE OF LINDSEY, FRANK E. SIEGENTHALER, AUDITOR OF SANDUSKY COUNTY, AND HENRY SETZLER, TREASURER OF SANDUSKY COUNTY,

Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case grows out of a special assessment levied by the Village of Lindsey, on the real estate owned by the plaintiff in error, abutting on Railroad Street, in Lind-

sey. Under Section 3812 of the Ohio code assessments may be made by one of three methods: first, by a percentage of the tax value of the property assessed, second, in proportion to the benefits which may result from the improvement, and, third, by the foot frontage of the property bounding and abutting on the improvement.

On May 3rd, 1920, the Council of the Village of Lindsey passed a resolution of necessity for the improvement of Railroad street. In that resolution they also determined the method of assessment to be by the front foot, in accordance with Section 3815, of the Ohio code. On May 10th, 1920, a notice of the passage of the resolution of necessity was served on the plaintiff in error. On March 11th, 1921, a notice was mailed to the plaintiff in error to the effect that on March 11th, 1921, the Council of the Village of Lindsey has passed an ordinance by which the sum of $1,040.60 had been levied against the property of the plaintiff in error. There never was a date or place set at any time where evidence or proof might be introduced with reference to the ordinance or the improvement. No notice was served on the plaintiff in error at any time other than those mentioned above. No hearing was ever had. Plaintiff in error filed a petition in the Court of Common Pleas, setting up the facts as above, asking for an injunction on the ground that the proceeding was illegal, and null, and void, because it was repugnant to and in conflict with Article 14, Section 1, of the Constitution of the United States, and for other reasons, among them that it exceeded 33 1/3% of the value, contrary to Section 3819 of the Code. A hearing was had and the petition dismissed. Plaintiff in error appealed to the Circuit Court of Appeals, setting up the same grounds of error. That court reduced the value of the property and automatically abated the assessment about $175.00, and affirmed the lower court, assessing

one-half of the costs against plaintiff. Plaintiff in error filed a petition in error in the Supreme Court of Ohio, setting up the same error. A motion was made in that court by the defendant in error to dismiss the petition in error on the ground that "the petition in error herein was filed by the plaintiff in error without leave of this court first granted, he claiming that the case involved a question under the Constitution of the United States, in that the statutes of the State of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment of the Constitution of the United States, when, in fact, these statutes have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned." The court sustained the motion, and dismissed the petition without opinion. Plaintiff in error then filed his petition for a writ of error with the chief justice of the Supreme Court of the State of Ohio, and obtained an order allowing the writ.

SPECIFICATION OF ERROR.

First. The Supreme Court of Ohio erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void, and in violation of the Fourteenth Amendment of the Constitution of the United States, in this that they did not constitute due process of law as required by said amendment.

Second. The said Supreme Court erred in not holding that the proceedings leading up to and resulting in the special assessment involved in said cause were unconstitutional, illegal and void and in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that proper notice was not

given to plaintiff in error, and no hearing or opportunity to be heard was granted to said plaintiff in error before the assessment in question became a finality, and constituted a lien on his property, as required by said Fourteenth Amendment.

Third. The Supreme Court erred in not holding that Sections 3812, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3834 and 3835, being the law under which the assessment herein involved was levied, are unconstitutional and illegal by reason of the fact that it does not comply with the Fourteenth Amendment of the Constitution of the United States, in this that it constituted a rule which excludes any inquiry as to special benefits, and the necessary operation of which is to the extent of the cost in excess of any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation.

Fourth. The said Supreme Court erred in not holding that the sections of the code enumerated in the third assignment of error are unconstitutional and illegal by reason of the fact that it does not provide for a proper notice, and does not provide for a hearing or an opportunity to be heard with reference to the assessment before it becomes a finality as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

BRIEF AND ARGUMENT.

I.

Before an assessment of taxes can be made upon property, *notice to the taxpayer, with an opportunity to be heard, is essential,* and somewhere during the process of the assessment, the taxpayer must have an opportu-

nity to be heard, and *such notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.*

Central of Georgia Railroad Co. vs. Wright, 207 U. S. 127;
Stuart vs. Palmer, 74 N. Y. 183.

II.

The statute which authorizes the levy of a special assessment under a rule which excludes any inquiry as to special benefits violates the Fourteenth Amendment of the Federal Constitution.

Norwood vs. Baker, 172 U. S. 269;
Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112;
Winona & St. Peter Land Co. vs. Minnesota, 159 U. S. 701;
Goodrich vs. Detroit, 184 U. S. 432.

III.

Many requirements essential to strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here *a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.*

Londoner vs. Denver, 210 U. S. 373.

The first finding of fact by the Court of Appeals of Sandusky County (Record 4) as follows:

> *"There never was a date or place set at any time where evidence or proof might be introduced with reference to that ordinance or that improvement."*

and the further finding by the Court of Appeals, that the only notice given the plaintiff in error was a notice of the passage of that resolution of necessity which was served seven days after its passage, and a notice mailed on the 11th day of March, 1921, to the effect that on March 11th, 1921, the Council had levied an assessment against plaintiff's property, were the only notices pretended to be served upon the plaintiff in error, creates the question and the only question in the case before this court, which may be stated as follows: Can a valid assessment be levied without notice to the owner of the property and without an opoprtunity to be heard with reference to the benefits derived, as compared with the amount of the assessment levied against the property. If this question is decided in the negative, it disposes of another question which may be stated as follows: Can a special assessment be legally levied under a statute which does not provide for notice and does not provide for a hearing with reference to the benefits derived from the improvement?

This case presents a somewhat novel situation, which may be stated in a few words. In *Norwood vs. Baker*, this court sustained the contention of the plaintiff in error that the statute under which that assessment was levied was unconstitutional upon the ground "that the assessment was made under a rule which excluded any inquiry as to special benefits." *The defect pointed out by this court in that case has never been remedied,* as is shown by the corresponding section of the present statute set opposite the sections passed upon by this court in the Norwood case, as follows:

NORWOOD VS. BAKER	HETRICK VS. LINDSEY
Sec. 2263. grants power to the Council to assess the whole or any part of a public improvement upon all of the taxable real estate in the corporation.	Sec. 3812, provides that the Council may assess upon the abutting, adjacent, contiguous or other special benefited lots in the corporation any part of the entire cost of an expense connected with the improvement.
Sec. 2264, provides that in case any part is to be assessed, it may be done "either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement.	Sec. 3812, provides that the assessment shall be "by any of the following methods: First, by the percentage of the tax value of the property assessed. Second, in the proportion to the benefits which may result from the improvement, or Third, by the front foot of the property bounding and abutting upon the improvement."
Sec. 227, provides for the appointment of a commission in case of assessment according to benefits.	Sec. 3847, provides for a commission "when it is determined to assess the whole or part of the cost of an improvement in proportion to the benefit which may result therefrom."
Sec. 2277, limits the assessment to be "in proportion as nearly as may be to the benefits which may result from the improvement."	Sec. 3819, provides that "the Council shall limit all assessments to the special benefits conferred upon the property assessed."
Sec. 2271, limits the assessment to 25% of the value of such lot.	Sec. 3819, limits the assessment to 33 1/3% of the value of the lot.

Assessment was made by the front foot method without any hearing and "without any right in the property owner to show when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received."

"The assessment was by the front foot and for a specific sum, representing such cost, and the sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abuttfng property exceeded the special benefits."

(Mandate) ."The judgment of the Circuit Court must be affirmed upon the ground that the assessment was under a rule which excluded any inquiry as to special benefits and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accrued to the abutting property therefrom to take private property for public use without compensation. It is so ordered."

Assessment made by the front foot method without any hearing and "without any right in the property owner to show when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received."

Precisely the same conditions existing as in *Norwood vs. Baker.*

The rule mentioned in *Norwood vs. Baker* is continued in precisely the same shape and in no particular has the statute or the rule been changed to conform with the decision in *Norwood vs. Baker.*

A reference to the sections of the statute covering this particular mode of assessment added hereto as an appendix will show that no notice of a hearing and no hearing is provided for as required by the *Norwood*

case. The corollary of this state of facts is that the assessment herein complained of is illegal, or *Norwood vs. Baker* and all the cases which have followed it must be overruled. Counsel for defendant in error in the court below contended that since Section 12075 gave the Court of Common Pleas jurisdiction to entertain a petition for an injunction, it constituted due process of law. This, however, apparently was not the notion of this court in the *Norwood* case, because at the time the *Norwood* case was pending before this court, Section 12075 was in the statutes of Ohio as Section 5848, and the Supreme Court of Ohio likewise, in *Railroad vs. Wagner*, 43 O. S. 75, says:

> "We must deal with the proceeding as one seeking to subject the plaintiff and its general property to all the incidents of a personal judgment; and we cannot suppose that the provisions we are construing were intended so far to dispense with jurisdictional facts as to ignore, in such a case, that fundamental principle of our law which hears before it condemns and to place upon a party the burden of showing, by vexatious and expensive litigation, that he has been injured by an unauthorized proceeding to charge him and his estate, of which he has neither notice nor knowledge."

In *Joyce vs. Barron*, 67 O. S. 265, the Supreme Court of Ohio says at page 274, in speaking of the claim of an independent suit:

> "This proposition is without merit. She did not have to. No such duty devolved upon her. The city had taken her property, and it was encumbent upon it to so conduct its improvement proceedings as to result in an ascertainment of her damages, or an adjudication, that none had been sustained, in the proper forum * * * Again it is urged * * * that if an action were brought to enjoin its collection, * * * the trouble with this proposition is the one suggested as to the claim in the paragraph above; * * *

> The failure to give notice is not a technical irregularity nor a technical defect. It goes it the very substance of the proceedings in as much as it deprives the landowner of valuable rights secured as well by the constitution as by the statute."

This court, in *Central of Georgia R. Company vs. Wright,* 207 U. S. 135, says:

> "Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require."

And in the same case, the court says further:

> "Before an assessment of tax could be made upon omitted property, notice to the taxpayer, and opportunity to be heard, was essential and that somewhere during the process of the assessment, the taxpayer must have an opportunity to be heard and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

That decision seems to stand unreversed and if that is the law, not only must this case be reversed, but the statute under which the assessment is levied is unconstitutional. This court again, in *Londoner vs. Denver,* 210 U. S. 389, says, at page 385:

> "Where the Legislature of a state instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment, and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevokably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personally, by publication, or by a law fixing the time and place of a hearing."

This was not done nor did the statute require it to be done, nor was there any effort made to do it. This court says further in *Londoner vs. Denver,* at page 386:

> "If it is enough that, under such circumstances an opportunity is given to submit in writing all the objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements may be dispensed with in proceedings of this nature. But even here a hearing in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal."

In the case at bar the plaintiff in error did not have even so much of a hearing as was assumed by this court in the *Londoner* case.

In this case, the Council provided that 3/50ths of the costs should be paid by the village and 47/50ths should be paid by the abutting property owner. In connection with this, the language of this court, in *Norwood vs. Baker,* 172 U. S. 269, at page 290, in discussing the use of the front foot method, is:

> "And that was the method pursued by the village of Norwood. The corporation manifestly proceded upon the theory that the abutting property could be made to bear the whole cost of improvement whether such property were benefited or not, to the extent of such cost."

That is precisely what they did in this case and in the argument against this particular ordinance, the actual facts are stronger than any hypothetical case and may be used to illustrate the effect of such a law. The Council placed the assessment at the rate of $6.05 per front foot, on each side of the street. At least two lots have been abandoned, by reason of the excessiveness of

the assessment. Under the ordinance the New York Central Ry. Co. was assessed in the sum of $6,546.10. A petition was filed for an injunction, which was disposed of by agreement, on May 11, 1923, an agreed order was entered remitting $3,286.12 of the railway assessment and placing it at $6,000.00, the original assessment in the meantime with interest and penalties having reached the sum of $9,286.12. As a part of the consideration for the agreement on the part of the railway company to pay $6,000.00, the Council of the Village of Lindsey vacated to the railway company, a strip of land along their right of way, which means that the railway did not pay anything like $6.05 per front foot, and it also means that the Village of Lindsey did not believe that the benefit amounted to $6.05 per front foot. Another angle was with reference to the assessment of the elevator, within a few hundred feet of the property in this case. It is worth conservatively perhaps $100,000.00. During the year 1918 they did a business of $780,000.00, in the year 1920 they handled 400 cars. Their assessment was $594.66. The court fixed the value of the sawmill property in the case at bar at $2,600.00, and the assessment of $866.67. During the year of 1920, one of their best years, they did a business of $4,032.28. In 1921 the *gross* business was $2,125.00. It is to be borne in mind that the sawmill business was owned by a partnership, the other partner not owning any interest in the land. The elevator was benefited as much as the sawmill property owner, yet their assessment was nearly one-third less, one of them was assessed one-third of its value; the other one-twentieth. It goes without saying that benefits must have been disregarded in one case or the other, and under the Ohio statute this is permissible, under the front foot rule. Further, it is a certainty that the elevator used the street infinitely more than did the sawmill,

yet no opportunity is afforded the owner to show the injustice, without expensive and vexatious litigation.

Supposing that the Village of Lindsey had sued out an order of attachment against this particular piece of real estate in the sum of $1,040.60 and the court has issued an order of sale, without a hearing to the defendant, as in this case, the court would set the action aside, because of violation of the Fourteenth Amendment, just as quick as it could get at it, yet the plaintiff in error is in precisely the same predicament. Suppose again, that the attachment statute of the State of Ohio permitted such a procedure, it would not require much of the time of this court to dispose of the statute and of everything done under it. The assessment law of Ohio allows just such a proceeding as this, under the name of assessment, instead of attachment. The decision and the statute in the case at bar are wrong, or the decision in *Norwood vs. Baker* is wrong, and if that decision is wrong then there is at least one method by which property may be taken from the owner without notice and without a hearing, which this court on numerous occasions has held to be necessary to constitute due process of law.

The Court of Appeals on hearing in that court, reduced the valuation, which under Section 3819 of the code, automatically reduced the assessment and taxed one-half of the costs against the plaintiff in error. If the plaintiff is called upon to pay one-half of the costs it nullifies the benefit derived from the reduction of the valuation. In other words, the court taxes against the plaintiff in error, one-half of the costs incurred by him in his successful effort to prove that the Village of Lindsey was attempting to take from him his property without due process of law and the Court of Appeals found that his contention was true, at least to the extent of approximately $175.00. That is, he sustained his con-

tention and was fined to the extent of one-half of the costs, for bringing it to the attention of the court.

Under the Constitution of Ohio, where a constitutional question is involved, the writ of error to the Supreme Court to review the lower court is a writ of right (Article 4, Section 6, Constitution of Ohio). Bearing this in mind, the only possible construction to be placed upon the Supreme Court's action in this case is that the motion was allowed because "these statutes have so long been held constitutional by the courts of this state, and have so long been accepted and followed in the practice of this state as constitutional, that their constitutionality can no longer be questioned." Counsel for defendant in error was challenged in the Court of Appeals, and again in the Supreme Court of Ohio to cite one case in which the Supreme Court of Ohio had passed upon the points raised in this suit other than *Joyce vs. Barron,* 67 Ohio State 265, and *Railroad vs. Wagner,* 43 Ohio State 75, which are cited in this brief, and he did not produce any. While the Supreme Court of Ohio may set up a Statute of Limitation as against the consideration and raising of constitutional questions involving the State Constitution, it cannot be said that they can enforce a Statute of Limitation against raising a constitutional question under the Federal Constitution. It may be elucidating of the action of the Supreme Court of Ohio to call to mind the fact that under the Constitution of Ohio, before the Supreme Court can declare a statute unconstitutional, all of the judges but one, must vote in favor if the unconstitutionality.

In conclusion we submit that this case must be reversed and remanded with directions to the lower court to grant the prayer of the petition.

ALBERT H. FRY,
Attorney for Plaintiff in Error.

APPENDIX.

CONSTITUTION OF THE UNITED STATES.

ARTICLE XIV.

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REVISED STATUTES OF OHIO.

§ 3812. Special assessments, how made.—Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream, or water-

course, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways, or drains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement. (107 v. 629; 101 v. 134; 96 v. 26, §9; 97 v. 98, §50.)

§ 3814. Resolution of necessity.—When it is deemed necessary by municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication. (97 v. 121, §51.)

§ 3815. Determination of nature of improvement; method of assessment and payment.—Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or

not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes. (107 v. 151; 97 v. 121, §51.)

§ 3816. Plans, specifications, estimates and profiles to be prepared and filed.—At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested. (97 v. 121, §51.)

§ 3817. Bonds and interest thereon.—When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided. (97 v. 121, §51.)

§ 3818. Notice, how served.—A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation with-

in the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be *prima facie* evidence of the service of the notice as herein required. (97 v. 122, §52.)

§ 3819. Limitation of assessments.—The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel or land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith. (97 v. 126, §53.)

§ 3820. Municipality to pay portion of cost of improvement.—The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections. (97 v. 126, §53.)

§ 3825. Ordinance for improvement, what to contain.—If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands

to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution therefore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement. (97 v. 122, §55.)

§3834. When certain special assessments deemed valid and binding.—When special assessments are made upon property for the construction of an improvement, and several kinds of material have been named in the ordinance, or ordinances, providing therefor, and on which bids have been received for the construction of such improvements with any and all of such materials, such assessments shall be valid and binding assessments upon the property so assessed. In the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided. (87 v. 123, §60.)

§3835. Council not to proceed with improvement without concurrence of three-fourths; exception.—No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event the council, a majority of the members elected thereto concurring, may proceed with the improvement in the manner herein provided. (96 v. 42, §61.)

IN THE

Supreme Court of the United States

No. 29,425.

Term No. 231.

October Term, 1923.

WESLEY HETRICK,

Plaintiff in Error.

vs.

THE VILLAGE OF LINDSEY, OHIO, ET. AL.,

Defendants in Error.

Error to the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF DEFENDANT IN ERROR, THE VILLAGE OF LINDSEY, OHIO.

W. J. MEAD, *Fremont, Ohio,*
Attorney for Defendant in Error.

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THE VILLAGE OF LINDSEY, OHIO, ET. AL.,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was the plaintiff in the action brought in the Court of Common Pleas of Sandusky County, Ohio, on June 8th, 1921, to enjoin the collection of the special assessments assessed by the Council of the Village of Lindsey, Ohio, against the property of

plaintiff, to-wit, $199.65 against Lot No. 175, and $840.95 against Lot. No. 176 in said village, for the improvement of Railroad Street in said village, plaintiff claiming different irregularities and also defects in the law under which said improvement and assessments were made. (Record pages 6-7 for petition).

To this petition said village answered denying all irregularities and defects, and setting forth plaintiff's knowledge of and participation in the work of said improvement. (Record pages 8-9).

In the hearing of said case in said court the only grounds claimed by plaintiff against the validity of said assessment were,

1. That said assessment exceeded the benefits to said lots or either of them,

2. That said assessment was in excess of the limit allowed by law to be levied upon property for local improvement, and

3. That the provisions of the General Code of Ohio are unconstitutional and void for the reason that they do not provide for notice to be given to the owner of property to be assessed and an opportunity to be heard before the tax is levied, and are therefore repugnant to and in conflict with Article 1, Section 16, and Article 1, Section 19 of the Constitution of the State of Ohio, and for the same reason in conflict with and repugnant to Section 1 of the Fourteenth Amendment to the Consttiution of the United States, in that they permit the taking of property without due process of law

In the hearing of said case a large amount of evidence was heard by said Common Pleas Court especially on the questions of benefits and values, and on Jan. 26th, 1922, said court sustained said assessment in its entirety and dismissed plaintiffs petition. (Record page 10).

Plaintiff then appealed the case to the Court of Appeals of said county, and the case was fully heard by that court, a large amount of evidence being presented at this hearing, which court on May 9th, 1922, found the value of said lots after the completion of the improvement to be $2,600.00 and that they were especially benefited to the extent of one-third of this value, and reduced said assessment from $1,040.60 on both lots to $866.67, and decreed that the amount of $866.67 was legally assessed against said property, and held against the claim of plaintiff that the provisions of the General Code of Ohio relating to special assessments for street improvements are unconstitutional. (Record pages 2-3).

Plaintiff's motion for a new trial was overruled, (Record page 3), and on plaintiff's request a finding of facts was made by said court (Record pages 3-4-5), and filed July 10th, 1922.

Said improvement is a brick pavement upon a concrete foundation and is 1,082 feet in length.

At and before the commencement of the proceedings to improve said street said lots were platted lots. (Fact 11).

Said lots adjoin, each abuts said improvement, and a saw mill property is located upon both said lots and a saw mill business transacted thereon. (Fact 12).

The assessment was made by the foot front of the property bounding and abutting upon the improvement, and assessments were made of $199.65 against Lot 175 and $840.95 against Lot 176.

Notice of the passage of the resolution of necessity for the improvement was served by the clerk in writing on the plaintiff personally on May 10th, 1920, which, with reference to the other proceedings, was at a proper time. (Fact 4).

Plaintiff was, in fact, served with a complete copy of the resolution.

Plaintiff in error had full knowledge of the work as it progressed and made no objections thereto. (Fact 18).

Plaintiff with his counsel appeared before and consulted with the Council as to the manner of the construction of the improvement and thereby caused it to be constructed in front of his property in the manner desired by him. (Fact 20).

The Council acted in good faith. (Fact 24).

The Council found the several lots to be especially benefited to the extent of the levy made against them. (Fact 15).

Plaintiff filed no claim for damages. (Fact 16).

Plaintiff never requested a hearing before the Council in said matter. (Fact 17).

All meetings of the Council were open and held at the usual meeting place. (Fact 23).

Said improvement was completed about December 1st, 1920. (Fact 19).

"All resolutions and ordinances required by the statute were passed by the Council and publications and service of the same was made and all notices were given and all things required by the statutes to be done were properly done by the Council and officers of said village and all proceedings relative to said improvements were regular and in accordance with the statutes, if the mailing of the notice of the assessment to plaintiff was in accordance with the statutes, and this court finds that such mailing was in accordance with the statute." (Fact 13).

Other findings of fact, 24 in all, were made by the court.

To said judgment of said Court of Appeals said plaintiff prosecuted error and filed his petition in error

in the Supreme Court of Ohio, as of right, on the 17th day of July, 1922. (Record page 18).

Petition in error in the Supreme Court of Ohio appears (Record page 1).

On October 23rd, 1922, defendants in error filed in the Supreme Court of Ohio, their motion to dismiss said petition in error, on the ground that same was filed in said court without leave first granted, plaintiff in error claiming that the case involves a question under the Constitution of the United States, in that the statutes of the State of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment to the Constitution of the United States, when in fact these statutes have so long been held constitutional by the courts of the state and have so long been accepted and followed by the practice of the state as constitutional, that their constitutionality can no longer be questioned, and said petition in error should not be filed as a matter of right and is on file without authority or right. (Record pages 10-11).

A hearing was had on said motion and on December 5, 1922, said court sustained said motion and dismissed said petition in error. (Record page 11).

On February 7th, 1923, plaintiff in error filed his petition for a writ of error (Record pages 12-13), and on said date same was allowed by Hon. C. T. Marshall, chief justice of the Supreme Court of the State of Ohio. (Record pages 13-15).

The questions that said assessment exceeded the benefits to said property and that it exceeded one-third of the value of the property after the improvement was completed were both raised in the Common Pleas Court and the Court of Appeals and determined as hereinbe-

fore stated, but neither of them were raised in the Supreme Court and probably could not be.

State, ex. rel., vs. Sockman, 84 O. S. 477;
State, ex. rel., vs. The Union Central Life Insurance Co., 84 O. S. 459;
Meyer vs. Beck, et. al., 87 O. S. 182, 186.

There was but one point of contention before the Supreme Court of Ohio, to-wit, that the statutes of Ohio relating to special assessments for street improvements are contrary to the Fourteenth Amendment to the Constitution of the United States, in that they fail to provide for notice to and hearing of the owner of the property assessed, and thereby permit such owner to be deprived of his property without due process of law, and this was the only question plaintiff in error attempted to bring before said court, and he was there heard both on brief and in oral argument, *and this is the only question before or that can now be before this court in this case.*

ARGUMENT.

In the ten assignments of error (Record pages 14-15), there is but one claim, the unconstitutionality of the special assessment statutes of Ohio, and this claim is made solely for the reason that said statutes do not provide for a proper notice, and do not provide for a hearing or opportunity to be heard with reference to a special assessment before it becomes a finality as required by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. (Sixth assignment, Record page 15). The other assignments are but repetitions of this.

Notice.

Notice to the owner of property to be assessed is provided for in the statutes.

> "When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, Council shall declare the necessity thereof by resolution * * * Such resolution shall be published as other resolutions, but shall take effect upon its first publication." Section 3814, General Code of Ohio.

Section 3815 G. C. O. provides what shall be determined in said resolution.

> "*A notice of the passage of such resolution shall be served by the clerk of Council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions.* If any such owners or persons are not residents of the county or if it appears by the return in any case of the notice that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer of person serving the notice, or a certified copy of the return shall be *prima facie* evidence of the service of the notice as herein required." Section 3818 G. C. O.
>
> "At the expiration of the time limited for so filing claims for damages, the Council shall determine whether it will proceed with the proposed improvement" * * * Section 3824 G. C. O.
>
> "If the Council decides to proceed with the improvement, *an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement,* shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the

mode of payment therefor, a reference to the resolution therefore passed for such improvement with date of its passage, and a statement of the intention of Council to proceed therewith in accordance with such resolution, and in accordance with the plans, specifications, estimates and profiles provided for such improvement." Section 3825 G. C. O.

" * * * Ordinances of a general nature, *or providing for improvements shall be published* as hereinafter provided before going into operation * * * " Section 4227 G. C. O.

Section 3881 G. C. O. provides for assessment and issue of bonds, and the latter part of said section is as follows:

"Any person so assessed shall have the option of paying his proportion of the assessment in cash within the period of thirty days from the date of levy thereof *upon due notice being given.*"

Thus in addition to the requirement of publication of the resolution and ordinances, service of notice by Section 3818, and notice by Section 3881 is required, and this latter section does not provide the kind or manner of notice, so

"Where a statute requires notice of a proceeding, but is silent concerning its form or manner of service, actual notice will alone satisfy such requirement." *Moore vs. Given,* 39 O. S. 661, Syl. 2.

The notice required by Section 3818 was served strictly in conformity with the statute, and when so done this notice has been held by the Supreme Court of Ohio to be sufficient to give the Council jurisdiction and authority to assess.

City of Canton vs. Wagner, 54 O. S. 329;
Joyce vs. Barron, Treas., 67 O. S. 264;
Cincinnati vs. Sherike, 47 O. S. 217.

Also the property owner is charged with notice of the proceedings after notice of the passage of the resolution of necessity, and with notice of the publications.

The Ohio Supreme Court has held the notice of Section 3818 sufficient to give the property owner the right to approach the Council and be heard with respect to the character of the pavement to be laid, as well as to file his claim for damages.

Joyce vs. Barron, Treas., 67 O. S. 264, 269;
Also, Green vs. Cincinnati, 4 O. C. D. 573, 574.

It has been held that where a statute does not provide for notice to owners of property to be assessed, such failure does not render the statute unconstitutional or void, also

That notice by publication is sufficient for assessment of tax for construction of a sewer.

Paulsen vs. Portland, 149 U. S. 29, Book 37, page 640;
Security Trust Co., etc., vs. City of Lexington, 203 U. S. 324, 51 L. Ed. 204.

"The Legislature of a state may provide for the apportionment of the cost of a street pavement upon the abutting lots, according to frontage, without any preliminary hearing as to benefits, and this will not constitute a taking without due process of law."

French vs. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. Ed. 879.

Owner's Right to Hearing.

Council meetings are open to the public. Section 4239 G. C. O.

The notice provided for in Section 3818 gives the right to approach the Council.

Joyce vs. Barron, Treas., 67 O. S. 264, 269;
Green vs. Cincinnati, 4 O. C. D., 573, 574.

Plaintiff with his counsel was heard by the Council as to the manner of improvement. (Fact 20).

Sections 3827, 3828, 3830, 3831 and 3832 provide for the consideration and determination of the owner's damages, if any.

> "Before adopting an assessment made as provided in this chapter, the Council shall publish notice for three weeks consecutively, in a newspaper of general circulation in the corporation, that such assessment has been made, and that it is on file in the office of the clerk for the inspection and examination of persons interested therein." Section 3895 G. C. O.
>
> "If any person objects to an assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of such notice, and thereupon the Council shall appoint three disinterested freeholders of the corporation to act as an equalizing board." Section 3848 G. C. O.

Section 3850 provides for a hearing by the Board of Equalization of all objections made to assessments and authorizes that board to make such finding and order as shall be required by the facts.

> "Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." Section 12075 G. C. O.

Plaintiff under this section has had two full hearings upon the merits of the assessments, one in the Common Pleas Court and one in the Court of Appeals, and

this in addition to the consideration and determination by the village Council with his right to there appear, had he so desired, and the assessments did not become a finality until the determination by the Court of Appeals which court is authorized under the laws of Ohio to, in such cases, determine the amount properly assessable.

> * * * "The court * * * may render judgment for the amount properly chargeable against said defendant or on such lot or land, but in such cases the court shall make such order for the payment of costs as it may deem equitable or proper." Section 3901 G. C. O.
>
> In a suit brought by a treasurer to collect a street assessment, and a judicial determination is made that the assessment substantially exceeds the benefits, the trial court has jurisdiction, upon proper pleadings, to go forward and determine what amount should be assessed.
>
> Walsh, et. al., vs. Sims, Treas., et al., 65 O. S. 211;
>
> Griswold vs. Pelton, Treas., 34 O. S. 482.

Whenever by the laws of a state or any state authority a tax is imposed upon property for the public use, and provides for a mode of contesting the charge thus imposed in the ordinary courts of justice, the owner of such property has due process of law.

> Walston vs. Nevin, et al., 128 U. S. 578, Book 32, page 544;
>
> McMillin vs. Anderson, 95 U. S. 37, Book 24, page 335;
>
> Davidson vs. Board of Administrators, etc., 96 U. S. 97, Book 24, page 616;
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> Paulson vs. City of Portland, 149 U. S. 37, Book 37, page 637;
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> Spencer vs. Merchant, 125 U. S. 345, Book 31, page 768;
>
> King vs. Mullins, 171 U. S. 405, Book 43, page 214;

King vs. Portland, 184 U. S. 61, 69-70, 46 L. Ed. 431, 436;
Adler vs. Whitbeck, 44 O. S. 539, 571;
Musser vs. Adair, 55 O. S. 466, 474;
Hodge vs. Muscatine County, et. al., 196 U. S. 275, 281-282, 49 L. Ed. 477, 481-482;
Security Trust, Etc., Co., vs. City of Lexington, 203 U. S. 323, 51 L. Ed. 204, 208;
Ballard vs. Hunter, 204 U. S. 242, 255, 51 L. Ed. 462, 472.

Limitations Provided.

Section 6 of Article 13 of the Constitution of Ohio provides that the General Aseembly shall restrict municipal corporations in assessments, etc., so as to prevent the abuse of such power.

Section 3820 G. C. O. requires the corporation to pay such part of the expense of improvements for which special assessments are levied as to the Council seems just, but this part shall not be less than 1/50 of all such cost and expense and in addition the cost of intersections.

> "The Council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after the improvement is made. * * * " Section 3819 G. C. O.
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> " * * * but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained." Section 3911 G. C. O.

This section refers to improvements of any kind.

Not a Taking of Property.

Plaintiff has and probably will here contend that this was a taking of his property. This cannot be until the assessment exceeds the benefits. There were no damages to his property. The determination of the Court of Appeals of the benefits is final.

There is no complaint that this assessment is not uniform or ratable.

A ratable assessment of the property to the extent of the special benefits, violates no constitutional right of the owner, and is just and proper.

Walsh vs. Barron, Treas., 61 O. S., 15.

The special assessment statutes of Ohio, as often as the question has been raised, have been held not to violate the Constitution of Ohio.

Hill vs. Higdon, 5 O. S. 243;
Ernst vs. Kunkle, 5 O. S. 520;
Reeves vs. Treasurer, 8 O. S. 333;
Walsh vs. Barron, Treas., 61 O. S. 15;
City of Dayton vs. Bauman, 66 O. S. 379, 393;
County Commissioners vs. Gates, 83 O. S. 31-32;
Railroad Company vs. Connelly, 10 O. S. 160;
Conservancy District vs. Ryan, 104 O. S. 85,

and also that they do not violate the Constitution of the United States.

Ernst vs. Kunkle, 5 O. S. 524;
Schroeder vs. Overman, Clerk, etc., 61 O. S. 1.

> "All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."
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> Article 1, Section 16, Ohio Constitution.

The General Code of Ohio, Section 3812, specifies the purposes, the property upon which and the method by which special assessments may be levied by municipal corporations. It operates alike upon all persons and property similarly situated, and provides for notice to the owners of the property to be assessed and opportunity for hearing before the municipal authorities, and also for a proceeding in and full hearing by the courts of the state, which courts are empowered to correct or set aside any wrongful or excessive assessment, or part thereof. Plaintiff has had the advantage of all these safeguards, and availed himself of the privilege. If this be not due process of law, how can due process of law be prescribed?

That this assessment was made strictly in accordance with the laws and Constitution of Ohio is not disputed. The Ohio courts have so found. That such assessments do not violate the Constitution of the United States has been for many years held as settled law by the Supreme Court of the United States. To cite the cases determined by the supreme courts of the different states and of the Supreme Court of the United States in which such assessments have been maintained would require many pages.

It seems that a brief examination of these authorities would convince plaintiff in error that his claim here is untenable, and while any constitutional question with

proper grounds for presentation would not be frivolous, yet it is frivolous to present an untenable claim against long settled principles.

It also seems that this question would not need further argument and ought to be affirmed, and also that this court might well dismiss the petition in error as an unwarranted appeal to the court.

Respectfully submitted,

W. J. MEAD,
Attorney for the Village of Lindsey, Ohio.

HETRICK *v.* VILLAGE OF LINDSEY, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 231. Argued April 23, 1924.—Decided June 2, 1924.

Failure of the state law to provide for notice and hearing before the making of a special assessment by a village council, does not deprive the assessed owner of his property without due process, when the law affords him, and he accepts, opportunity to determine all questions of law and fact as to the validity, fairness, and proper amount of the assessment, by proceedings brought by him in the state courts. P. 387.

Affirmed.

ERROR to a judgment of the Supreme Court of Ohio which dismissed, as frivolous, a petition in error to review a judgment of the State Court of Appeals revising a special assessment.

Mr. Albert H. Fry for plaintiff in error.

Mr. W. J. Mead for defendants in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Hetrick owned two lots in the Village of Lindsey, Ohio, No. 175 and No. 176. He brought suit in the Common Pleas Court of Sandusky County against the Village and the Auditor and Treasurer of the county, to enjoin the collection of front foot street assessments levied by the village council against the two lots. He contended, first, that the assessment exceeded the benefits to the lots or either of them; second, that the assessment was in excess of the limit allowed by law to be levied upon property

for local improvement, which by the statute was one-third of its value; third, that the assessment was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that there was no provision for notice to be given to the owner of the property to be assessed and an opportunity to be heard before the tax was levied.

Evidence was taken on the question of benefits and the value of the lots. The Common Pleas Court sustained the assessment in its entirety and dismissed the petition. The plaintiff then appealed to the Court of Appeals of the county, and the case was reheard by that court on new evidence. Section 3819 of the General Code of Ohio, in part, is as follows:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after the improvement is made."

The Court of Appeals found that the value of the lots, after the completion of the improvement, was $2,600, and that they were especially benefited to the extent of one-third of this value, reduced the assessments from $1,040.60 on both lots to $866.67, and enjoined the collection of more than this amount. The Court of Appeals found other facts as follows:

Notice of the passage of the resolution of necessity for the improvement had been served by the clerk of the council in writing on the plaintiff personally within the time required by the statute. He had full knowledge of the work as it progressed and made no objection thereto. He appeared with his counsel before the village council, consulted with it as to the manner of the construction of the improvement and succeeded in having its char-

acter changed in front of his property to conform to his desire. He never requested a hearing before the council on the public necessity of the improvement or the validity or amount of the assessment.

In due time after the decree in the Court of Appeals, plaintiff filed a petition in error in the Supreme Court of the State. The defendants made a motion to dismiss it, on the ground that no leave to file it had been granted. The plaintiff claimed that no leave was necessary under the state practice, because the case involved a question under the Constitution of the United States as to the validity of the statutes of the State relating to special assessments for street improvements. The defendants answered that such statutes had been so long held constitutional by the courts of the State that their constitutionality could no longer be questioned, and therefore that the petition should be dismissed, presumably as frivolous. The court sustained the motion and dismissed the petition. A writ of error to bring the case here was allowed by the Chief Justice of the Supreme Court of the State.

The decisions of fact by the state Court of Appeals that the assessment did not exceed the benefit of the property and that it did not exceed one-third of the value of the property after the improvement was completed, are not questioned here. The only point of contention made is that the Ohio statutes relating to special assessments for street improvements do not require a notice to, and a hearing on behalf of, the owner of the property assessed by the village council and therefore permit the owner to be deprived of his property without due process of law.

Section 12075 of the General Code of Ohio has for many years provided as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and en-

tertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Under this section the plaintiff had two full hearings in two courts upon the merits of the assessments, that is, upon the question whether the special benefits conferred were greater than the value of the property, and second, whether the assessment exceeded one-third of the value of the property. This is in accord with the previous decisions of the Supreme Court of Ohio in reference to the power of the state courts in passing on the validity of assessments either in a suit to collect the same or in a suit by the assessment payer to enjoin them. *Walsh* v. *Sims,* 65 Oh. St. 211; *Griswold* v. *Pelton,* 34 Oh. St. 482. It thus appears that the plaintiff in this case had had opportunity by contesting the assessment in court to review all the questions of law and fact as to the validity and fairness of the assessment under the statutes of Ohio, that these facts were passed upon by the court and that the plaintiff had secured from that court a reduction of the assessment. In such a case it has been frequently decided that the judicial procedure constitutes due process of law and supplies every requirement for due notice and hearing. *McMillan* v. *Anderson,* 95 U. S. 37, 41; *Davidson* v. *New Orleans,* 96 U. S. 97, 104–5; *Spencer* v. *Merchant,* 125 U. S. 345, 355–6; *King* v. *Portland,* 184 U. S. 61, 70; *Ballard* v. *Hunter,* 204 U. S. 241, 255; *Embree* v. *Kansas City Road District,* 240 U. S. 242, 251; *Mt. St. Mary's Cemetery* v. *Mullins,* 248 U. S. 501, 506.

It is unnecessary for us to consider, therefore, the sufficiency of notice and opportunity for a hearing before the council under the statutes of Ohio for assessments, or the question whether plaintiff was estopped by his acquiescence and conduct from raising such an issue.

Decree affirmed.